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In the Supreme Court of the United States

OCTOBER TERM, 1981

FEDERAL ENERGY REGULATORY COMMISSION, ET AL., APPELLANTS

v.

MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

REPLY BRIEF FOR THE APPELLANTS

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In our opening brief we described in considerable detail the statutory scheme established by Congress in Titles I and III and Section 210 of Title II of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 *et seq.* (PURPA), and we explained why the challenged provisions of PURPA pass constitutional muster. Despite the many words written in response by appellees (and their supporting amici), only a few matters of substance warrant reply.

1. Both Mississippi (Miss.) (Br. 41-50) and Mississippi Power & Light (MP&L) (Br. 26-31) argue that the statute at issue is not a proper exercise of Congress' power under the Commerce Clause because it does not regulate commerce at all, but rather by imposing certain obligations upon the states, the statute regulates the "governance of commerce." We do not deny that the statute imposes certain minimal

obligations upon state regulatory authorities, but there can be no serious dispute that the statute ultimately is directed at regulating the activities of private entities engaged in intrastate sales of electricity (Title I and Section 210 of Title II) and natural gas (Title III) that have a substantial effect on interstate commerce. As we demonstrated in our opening brief (at 16-25), regulation of such activities is clearly within Congress' commerce power.[1] Appellees' primary objection is not to federal regulation of intrastate energy transactions as such, but rather to the *means* selected by Congress in PURPA to effect that regulation. Appellees' "governance of commerce" claims are therefore indistinguishable from their claims under the Tenth Amendment.

2. Appellees argue, in essence, that PURPA impermissibly intrudes upon state sovereignty by pressing the machinery of state governments into the service of a federal cause. But the leading case in this Court on which appellees rely, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), addressed a problem quite different from that presented here. In the statute under consideration in *National League of Cities*, Congress sought "to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments." *Id.* at 852. This Court found that under the federal system of government embodied in the Constitution, the states, as sovereigns, retain the "freedom to structure integral operations in areas of traditional governmental functions" (*ibid.*), and that the statute at issue, which directly impinged on that freedom, would have

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[1] In addition to the authorities cited in our opening brief see *Oklahoma* v. *FERC*, 661 F. 2d 832 (10th Cir. 1981), aff'g 494 F. Supp. 636 (W.D. Okla. 1980), petition for cert. pending, No. 81-1232, (filed Dec. 21, 1981) (holding that the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3301 *et seq.*, which, *inter alia*, regulates intrastate sales of natural gas, was a valid exercise of Congress' commerce power).

"impair[ed] the States' 'ability to function effectively in [the] federal system.' " *Ibid.*, quoting from *Fry* v. *United States*, 421 U.S. 542, 547 n.7 (1975).

Unlike *National League of Cities*, this case does not involve an attempt by Congress to intrude upon an area—such as a state government's employment arrangements with its employees—in which the states necessarily must be free to exercise exclusive authority in order to preserve their separate existence. On the contrary, as noted in our opening brief (at 27-28, 31-35), in enacting PURPA Congress legislated in an area where it clearly had authority to act. Indeed, as appellees concede, Congress could have displaced the states entirely in this area. That preemptive legislation was not enacted was primarily out of deference to requests from state officials and others, pleading for a formula that would not intrude unnecessarily upon the states' pre-existing regulatory authority over retail sales of electricity and natural gas.

Furthermore, as we have explained at length in our opening brief (at 35-41), PURPA does not interfere with the ability of the states "to structure integral operations in areas of traditional governmental functions." *National League of Cities* v. *Usery, supra*, 426 U.S. at 852. Instead, Congress adopted a flexible approach that preserves state freedom of choice within the framework of a statute that addresses a serious problem of national dimensions. Under Titles I and III, the states are free (provided that they follow minimal due process requirements) to reject the federal ratemaking standards in their entirety. By the same token, state regulatory authorities have extremely broad discretion in their choice of the means for implementing the substantive requirements of Section 210.

We recognize, of course, that PURPA does require state utility regulators to perform certain governmental functions, and that, in this sense, PURPA may be distinguishable from the Surface Mining Act at issue in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, No. 79-1538 (June 15, 1981), which gave the states the choice of opting out of the regulatory program entirely. But, as previously noted, under Titles I and III the states are not obligated either to adopt or to implement any of the federal standards. Thus, the states may opt out of the regulatory program established in Titles I and III, with the assurance that under the present statutory scheme the federal government may not exercise its preemption powers to overrule the states' decisions.

Moreover, to the extent that Section 210 of PURPA imposes regulatory obligations on state regulatory commissions, the state commissions may fulfill those obligations by performing functions that are essentially adjudicative in nature. The states are not compelled to enact legislation, promulgate regulations, or expend state funds. At most, Section 210 simply establishes federal substantive rules of decision and requires the state commissions to apply those rules in particular settings in which the commissions already exercise jurisdiction.

The *substantive* provisions of Section 210 require electric utilities to purchase electricity from, and sell electricity to, qualifying cogenerator and small power production facilities. 16 U.S.C. (Supp. III) 824a-3(a). Section 210 also establishes certain standards governing these transactions, and exempts qualifying facilities from a number of federal and state regulatory statutes. 16 U.S.C. (Supp. III) 824a-3(b) through (e). These provisions, and the Commission's substantive rules promulgated thereunder, merely regulate relationships between utilities and qualifying facilities and thus do not offend the Tenth Amendment because, as the

Court recently confirmed in *Hodel* v. *Virginia Surface Mining & Reclamation Association, supra*, slip op. 25, that Amendment does not "prohibit[] Congress from displacing state police power laws regulating private activity." Under the Commission's regulations, the *implementation* provisions of Section 210 may be satisfied by, *inter alia*, "an undertaking to resolve disputes between qualifying facilities and electric utilities * * *." 18 C.F.R. 292.401(a). Thus, state regulatory authorities need only agree to respect the substantive federal rules in adjudicating controversies involving electric utilities over which the authorities already exercise jurisdiction under state law.[2] It is settled that the Supremacy Clause requires state tribunals to enforce controlling federal law, at least in matters within the tribunals' existing state law jurisdiction. See *Testa* v. *Katt*, 330 U.S. 386 (1947). Cf. *Washington* v. *Fishing Vessel Association*, 443 U.S. 658, 692-695 (1979). The implementation provisions of Section 210 are simply another application of this established principle.[3]

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[2]To be sure, as noted in our opening brief (at 38), Congress, rather than the states, has traditionally exercised regulatory authority over *wholesale* electricity transactions, while leaving regulation of *retail* transactions to the states. See 16 U.S.C. (& Supp. III) 824. But there can be no doubt that, in exercising its plenary authority to regulate interstate commerce, Congress may confer upon the states the ability to regulate an aspect of interstate commerce. See *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, No. 79-1423 (May 26, 1981) slip op. 4. Congress found that in order to encourage the development of cogeneration and small power production facilities, it was necessary to regulate both retail and wholesale transactions between those facilities and electric utilities. Accordingly, Congress provided that state authorities already involved in regulating a utility's retail transactions should also exercise jurisdiction over a limited class of wholesale transactions with qualifying facilities.

[3]The brief filed on behalf of amici the State of Maryland, *et al.* (at 14-27) contains a thorough discussion of this point.

3. Appellees erroneously contend (Miss. Br. 34-38; MP&L Br. 41-46) that this is not a situation "in which the nature of the federal interest advanced may be such that it justifies State submission." *Hodel* v. *Virginia Surface Mining & Reclamation Association, supra*, slip op. 21 n.29. But in making this contention, appellees completely ignore the serious and pervasive nature of the energy problem that Congress was addressing in PURPA and in other energy-related legislation. As we have outlined in our opening brief (at 2-12, 19-23), Congress found that the energy problem was nationwide in scope and that the problem had serious repercussions, not only for the nation's economy, but for its foreign relations and national security as well. The dimensions of the problem were spelled out in the Report of the House Ad Hoc Committee on Energy, H.R. Rep. No. 95-543, 95th Cong., 1st Sess. 5-7 (1977):

> The fundamental problem for U.S. energy policy is the insecurity of its oil supply. Domestic demand for oil has been growing, while total domestic production, except that from the Outer Continental Shelf and from Alaska, has been declining. The Nation's oil imports have consequently increased to the point where the United States is expected to import between 45 percent and 50 percent of its oil supplies in 1977, up from 23 percent in 1970 when domestic oil production peaked.
>
> * * * * *
>
> Our reliance on imported oil is expected to increase dramatically if present practices and policies are continued. * * *
>
> Such an increase in our reliance on oil imports would greatly constrain our foreign policy and could do considerable damage to our economy.
>
> * * * * *

Further, there is widespread agreement that a continuation of present world oil consumption trends, even with significantly higher world oil prices, will lead to a very tight world oil market in the mid-1980's. At that point, the world's oil supply will be straining to meet world demand with very serious implications for both international security and the world economy. Sudden disruptive price increases, accompanied by arbitrary curtailments of supply, will generate shocks to the national security and economic stability of each oil importing country. This is a development that each country should strive to avoid.

The choice for the United States is evident: We must begin now, while there still is time to make adjustments, to change the way Americans use energy and avoid the disruption that could be suddenly thrust upon us from external sources. Such disruptions occurred in 1973, when the Arab oil embargo was accompanied by the quadrupling of OPEC (Organization of Petroleum Exporting Countries) oil prices over a short period of three months.

* * * * *

The United States faces the problem of making the transition from an era of cheap abundant energy to relative scarcity of expensive energy supplies. Further, because of the long lead time involved, the transition must be started now, so as to avoid serious future shocks to the Nation and to its economy from energy shortages. The benefits of having a more secure energy supply for the long term should more than justify the short term costs of a transitional program.

In view of the extremely serious nature and broad dimensions of the energy problem, the challenged provisions of PURPA, which impose modest demands upon the states,

are a permissible exercise of Congress' power to regulate commerce. See *Hodel* v. *Virginia Surface Mining & Reclamation Association, supra*, slip op. 21 n.29; *National League of Cities* v. *Usery, supra*, 426 U.S. at 852-853; *id.* at 856 (Blackmun, J., concurring); *Fry* v. *United States, supra*.[4]

Appellees do not dispute the seriousness of the energy problem that Congress confronted. Instead, they argue (Miss. Br. 34-38; MP&L Br. 41-46) that PURPA does not represent a proper response because it is not designed to produce immediate results and because the savings of scarce energy resources it is intended to achieve are small in comparison to the overall dimensions of the problem. But these judgments were for Congress to make in enacting the legislation. So long as there is a rational basis for Congress' determination that the measures it adopted would promote the statute's objectives, there can be no cause for complaint. See *Hodel* v. *Indiana*, No. 80-231 (June 15, 1981), slip op. 7. As our opening brief demonstrates (at 4-6, 8-11, 24-25), "the Act's regulatory scheme is reasonably related to the goals Congress sought to accomplish." *Hodel* v. *Virginia Surface Mining & Reclamation Association, supra*, slip op. 16. Moreover, the fact that the energy problem does not lend itself to "quick fixes" but demands long term solutions cannot conceivably support appellees' claim that the problem is not sufficiently serious to warrant enlisting the participation of the states as part of a national effort to achieve greater energy independence. And, while the wisdom of the particular means chosen are not at issue here, the briefs of numerous amici attest to the substantial contributions

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[4]In addition, the statute is a valid exercise of Congress' national security powers under Article I, Section 8, Clauses 11-16 of the Constitution. See pages 9-11, *infra*.

that PURPA has made to improving the nation's energy posture.[5]

4. Even if the Court were to conclude, under the rationale of *National League of Cities*, that PURPA is not a valid exercise of Congress' commerce power, the statute nevertheless should be upheld against appellees' Tenth Amendment challenge as within the power of Congress to protect the national security.[6] In *National League of Cities*, the Court stated that "[n]othing we say in this opinion addresses the scope of Congress' authority under its war power." 426 U.S. at 855 n.18. Indeed, the Court specifically rejected the notion that its decision effectively overruled *Case* v. *Bowles*, 327 U.S. 92 (1946), which had upheld, as a proper exercise of the war power, the imposition of federal price controls to sales of goods by the states. 426 U.S. at 854-855 n.18.

The courts of appeals that have addressed the issue subsequent to *National League of Cities* have uniformly ruled that statutes enacted under the war power may be sustained even though they might not have survived Tenth Amendment scrutiny had they been predicated on the commerce power.[7] In *Cantwell* v. *County of San Mateo*, 631 F. 2d 631, 636-637 (9th Cir. 1980), cert. denied, 450 U.S. 998

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[5]See, *e.g.*, the briefs amici curiae filed on behalf of the State of Maryland, *et al.* (at 19-22); the National Alliance for Hydroelectric Energy, *et al.* (at 5-19); Windfarms, Ltd., *et al.* (at 1-5); the American Paper Institute, Inc. (at 2-4); and the Hawaii Sugar Planters' Association (at 2-6, 17-23).

[6]See the briefs amici curiae filed on behalf of the State of Maryland, *et al.* (at 27-30); and the Energy Law Institute, *et al.* (at 25-30).

[7]Conversely, the lower courts that have relied on *National League of Cities* to strike down legislation as violative of the Tenth Amendment have done so only where the statute in question was based solely on the Commerce Clause. See *State Water Control Board* v. *Washington Surburban Sanitary Commission*, 654 F. 2d 802, 807 n.9 (D.C. Cir. 1981) (collecting cases).

(1981), the court held that *National League of Cities* is "inapposite" when Congress legislates under its war power, and that "the constitutional grant of [this] power[] is sufficient to sustain [the legislation] against a tenth amendment challenge." See also *Jennings* v. *Illinois Office of Education*, 589 F. 2d 935, 937-938 (7th Cir.), cert. denied, 441 U.S. 967 (1979). In *Peel* v. *Florida Department of Transportation*, 600 F. 2d 1070, 1082-1085 (5th Cir. 1979), the court employed a balancing test in upholding the constitutionality of the Veterans' Reemployment Rights Act, 38 U.S.C. 2021 *et seq.* Noting that the provision of reemployment rights for military veterans is a legitimate exercise of Congress' war power, and that that power "is one of the vital powers of Congress, essential to the protection of the nation" (600 F. 2d at 1084), the court concluded (*ibid.*) that the Tenth Amendment is not violated "[w]here * * * Congress has acted in a direct manner under its war power and has not unduly encroached upon the state's integral governmental functions."

As this Court has noted, the constitutionality of a statute "does not depend on recitals [by Congress] of the power which it undertakes to exercise." *Woods* v. *Miller Co.*, 333 U.S. 138, 144 (1948). In enacting PURPA, however, Congress expressly invoked not only its commerce power but also its power to preserve the national security. 16 U.S.C. (Supp. III) 2601. See H.R. Conf. Rep. No. 95-1750, 95th Cong., 2d Sess. 67 (1978). The legislative history confirms that Congress viewed this country's increasing dependence on foreign sources of energy as posing serious threats to the security of the nation. See pages 6-7, *supra*; see also, *e.g.*, 123 Cong. Rec. 25894 (1977) (remarks of Rep. Ashley). PURPA was intended to help reduce that dependence and thus to eliminate the danger that a shortfall in foreign oil supplies might cripple the national economy, impair the

nation's ability to defend itself and require military intervention overseas in order to preserve vital oil supplies. There unquestionably is a rational basis for Congress' belief that PURPA would contribute to preserving national security by encouraging more efficient use of scarce energy resources and the development of alternative energy sources. Thus, the nature of the particular national security interest involved in this case is compelling, and the statute in suit plays an important role in serving that interest. Because the national security interest here outweighs the minimal intrusion placed upon the states, the statute survives scrutiny under the Tenth Amendment. See *Ashwander* v. *TVA*, 297 U.S. 288, 326-328 (1936); *Case* v. *Bowles, supra*, 327 U.S. at 101-102; *United States* v. *Oregon*, 366 U.S. 643, 648-649 (1961).

For the foregoing reasons and the reasons set forth in our opening brief, the judgment of the district court should be reversed.

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